

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of)

Advanced Television Systems And Their)
Impact Upon The Existing Television Service)

MM Docket No. 87-268

To: The Commission

**COMMENTS ON PETITIONS FOR
RECONSIDERATION AND CLARIFICATION**

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SUMMARY

Mountain Broadcasting Corporation ("Mountain"), the licensee of WMBC-TV, Newton, New Jersey, is seeking reconsideration of DTV channel assignments that will cut its existing NTSC service area population by 19 percent and threaten an even greater loss of service on a permanent basis. Mountain has shown that imposing such losses on a new, independent UHF station owned by minorities and licensed to a northern New Jersey community would contravene numerous, longstanding Congressional and FCC policies, as well as the very goals underlying the DTV proceeding itself.

Other New York area licensees have now filed petitions for reconsideration expressing concern with the interference caused by the same two assignments, DTV channel 61 at Newark for WNET and DTV channel 8 at Newton for WMBC. Thus, there is now ample evidence in the record that these two DTV assignments would not be in the public interest and must be reconsidered.

The Commission recently released a Notice of Proposed Rulemaking to reallocate the spectrum from the existing television channels 60-69 for public safety use, other fixed and mobile services, and broadcasting. Mountain recognizes the need for additional public safety spectrum locally and that revenues may be derived from the auction of recovered spectrum for commercial uses. Moreover, the Commission's NPRM properly concluded that existing television service on those channels should be protected from interference during the transition period. Unfortunately, however, the desire to recover as much television spectrum as possible at present has resulted in a table of DTV allotments that will create interference among television broadcasters. In these circumstances, it simply makes no sense to limit the

use of “non-core” channels for DTV during the transition period, at least in the most congested areas of the country such as the New York market.

Furthermore, the Commission should adopt an absolute limit on the service area loss that may be imposed on any one station during the transition to DTV. Mountain understands that any DTV allotment plan may result in some degree of interference to some stations, at least during the transition period. But the size of the service area population loss imposed on WMBC during the transition, and threatened thereafter, clearly contravenes the Commission’s underlying policy goals to minimize interference to existing NTSC service and to replicate that service with DTV. The likelihood that the DTV transition period will be extended makes the need for a floor on population loss during that time even more acute.

The Commission recently concluded a proceeding, pursuant to the Telecommunications Act of 1996, to identify and eliminate market entry barriers for small businesses in the provision and ownership of new telecommunications and information services. In the DTV proceeding, the Commission has given television broadcasters the flexibility to provide supplemental digital services. The implementation of DTV thus provides an important opportunity for small businesses owning existing television stations to enter new telecommunications and information service businesses, consistent with the Congressional goal.

Unfortunately, judging by the New York area allotments, the transition to DTV will constitute a significant burden on small businesses. As Mountain has previously shown, in the television industry it is UHF independent stations that are most likely to be small businesses. The four stations that would experience the largest interference in the New York

ADI during the transition to DTV are all UHF, and WMBC on channel 63 would bear the most significant loss of all. A small television broadcaster will be economically unable to expand into an auxiliary service business if its basic television business is no longer viable. Moreover, reducing a station's service area will reduce the population to which it can provide auxiliary telecommunications or information services.

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Mountain Broadcasting Corporation ("Mountain"), by its attorneys and pursuant to Section 1.429(f) of the FCC Rules, respectfully submits these comments on certain petitions for reconsideration or clarification of channel assignments and related policies for the implementation of digital television ("DTV"), as adopted in the Sixth Report and Order ("Sixth Order")¹ in the above-captioned proceeding. Mountain is the licensee of independent UHF station WMBC-TV ("WMBC"), channel 63, Newton, New Jersey.

Mountain's own Emergency Petition For Reconsideration ("Petition") demonstrated that proposed DTV channel assignments in the New York market will extinguish 19 percent of WMBC's existing service area population during the transition to DTV and threaten to eliminate 28 percent of that population on a permanent basis. Such losses are untenable for any station, let alone a new UHF independent. Other petitioners have now challenged the

¹FCC 97-115, released April 21, 1997. Mountain's Comments are timely filed within 15 days after publication of a notice of these petitions in the Federal Register, 62 Fed. Reg. 36066 (July 3, 1997), pursuant to 47 C.F.R. § 1.429(f). To the extent necessary, in the interest of convenience, Mountain requests leave to consolidate its comments on various petitions in this one filing.

same channel assignments and certain related policies as contrary to the underlying goal of service area replication.

I. Other Broadcasters Share Mountain's Concerns With Specific DTV Assignments In The New York Market.

Mountain's Petition pointed out that the assignment of channel 61 to WNET, Newark, New Jersey for DTV use would be largely responsible for WMBC's 19 percent loss of existing service area population during the transition to DTV. Further, the assignment of DTV channel 8 to WMBC may cause permanent interference, eliminating 28 percent of its service area population on a permanent basis, if existing NTSC broadcasters on channels 7 and 9 retain those desirable and established channel positions for DTV.

Other New York area broadcasters have expressed concern with the same two DTV assignments. The licensee of WNET, Educational Broadcasting Corporation, argues that the assignment of DTV channel 61 to that station is "particularly inappropriate" because it will create a severe financial burden while diminishing WNET's service area.² Tribune Broadcasting Company ("Tribune") reports that the assignment of DTV channel 61 to WNET also will result in "unacceptable" interference to 1.9 million of the 4.7 million people in the NTSC service area of its co-channel station WTIC-TV, Hartford, Connecticut.³ Accordingly, there is now ample evidence in the record that the assignment of DTV channel 61 to WNET would not be in the public interest.

²Petition For Reconsideration of the Sixth Report and Order, filed June 13, 1997 by Educational Broadcasting Corporation ("WNET Petition"), at 3-4.

³Petition For Partial Reconsideration Of The Sixth Report And Order Submitted By Tribune Broadcasting Company, filed June 13, 1997, at 5.

PBS has made certain proposals regarding educational television stations such as WNET that initially have been assigned non-core DTV channels. For example, it would allow the licensees of such stations to: select new DTV channels in the core spectrum that do not fully replicate their NTSC coverage or that receive more interference than normally allowed; switch to DTV operation overnight on their NTSC channel without constructing on their DTV assignment; defer DTV construction until they receive a final, core DTV channel; and operate at less than the minimum hours required.⁴ If available to WNET, certain of these proposals may benefit WMBC by reducing interference to its NTSC operation on channel 63. However, relief at the option of WNET will not necessarily benefit WMBC and its viewers, or eliminate all of the massive interference WMBC faces, and thus provides no real assurances to Mountain.

Regarding WMBC's own DTV assignment, ABC, Inc. argues that the short-spacing between channel 8 and WABC-TV's NTSC assignment on channel 7 will result in "substantial" and "unacceptable" interference to WABC's service area, and will likely result in similar harm to the NTSC service area of WWOR-TV on channel 9.⁵ The licensee of co-channel station WTNH-TV, New Haven, Connecticut argues that it, too would suffer "substantial interference" within its NTSC contour because of the channel 8 assignment to

⁴Petition for Reconsideration and Clarification of Association of America's Public Television Stations and Public Broadcasting Service, filed June 13, 1997.

⁵Petition For Reconsideration Of The Sixth Report And Order, filed by ABC, Inc. ("ABC Petition"), June 13, 1997, at Attachment A, p. 4.

WMBC, depriving service to 1.6 million of 4.6 million persons.⁶ In addition, Pulitzer Broadcasting Company ("Pulitzer") reports that another co-channel station, WGAL, Lancaster, Pennsylvania would lose approximately 600 square kilometers of NTSC service due to the assignments of DTV channel 8 to WMBC and to another station.⁷ Again, the record demonstrates that this DTV assignment must be revised.

Mountain's Petition For Reconsideration reported one possible alternative for WMBC's DTV operations might be channel 34, and asked the Commission to evaluate that possibility in light of Mountain's concerns and the underlying policy of service area replication.⁸ Mountain will also further study this possibility, now that OET Bulletin 69 has been released.⁹ Alternatively, as discussed below, it may well be necessary to rerun the New York area DTV assignments, making full use of the entire spectrum available.

Pulitzer, the licensee of WGAL, has argued that the Commission should ameliorate NTSC service area loss by adopting temporary caps on the transmission power or antenna height of DTV stations that would cause such interference, subject to biennial review.¹⁰ Presumably, Pulitzer would apply such a cap to WMBC. Although this policy would further

⁶Petition For Partial Reconsideration of WTNH Broadcasting [*et al.*], filed June 13, 1997, at 4-5.

⁷Petition For Clarification And Partial Reconsideration of the Sixth Report and Order Submitted By Pulitzer Broadcasting, filed June 13, 1997, at 4-5.

⁸Mountain Petition at 19-20.

⁹Parties seeking reconsideration of their DTV assignment have been given an extension of time in which to submit new proposals, until August 22, 1997.

¹⁰Petition For Clarification and Partial Reconsideration of The Sixth Report and Order submitted by Pulitzer Broadcasting Company, filed June 13, 1996, at 6-9.

reduce Mountain's DTV service area during the transition, it might also benefit WMBC's existing NTSC service if the interference from WNET's DTV operation on channel 61 is similarly capped. This policy could create disparate results, however, where the interfering stations are in separate television markets.¹¹ As discussed below, legislation pending in Congress would extend the DTV transition period in markets with insufficient DTV penetration. A station's DTV operations should not remain capped after the surrender of its own NTSC license, even if it creates interference to the NTSC operation of another station in an adjacent, but smaller market where the transition to DTV is not yet complete.

II. The Commission Must Utilize The Full Television Spectrum For DTV In Congested Areas During The Transition.

On July 10, 1997, the Commission released a Notice of Proposed Rulemaking to reallocate television channels 60-69.¹² Specifically, the Commission proposes to allocate 24 MHz of this spectrum for public safety use and the remaining 36 MHz for other fixed and mobile services and for broadcasting. Channel 63 falls within the 24 MHz targeted for public safety use.¹³ The Notice states that existing full service television stations would be "fully protected" from interference until the end of the DTV transition period.¹⁴

¹¹For example, WGAL is in the smaller Harrisburg-Lancaster-Lebanon-York, Pennsylvania Designated Market Area.

¹²Notice of Proposed Rulemaking in ET Docket No. 97-157, FCC 97-245, released July 10, 1997.

¹³*Id.* at ¶ 11.

¹⁴*Id.* at ¶ 17.

Mountain recognizes the need for additional public safety spectrum and that revenues may be derived from the auction of recovered spectrum for commercial uses. Moreover, the Commission properly concluded that existing television service on these channels should be protected during the transition period. Unfortunately, however, the desire to recover as much television spectrum as possible at present has resulted in a proposed table of DTV allotments that will increase interference among television stations and reduce service to the public. The Association For Maximum Service Television, Inc. and Broadcasters Caucus ("MSTV") report that the Sixth Order's Table of Allotments actually increases interference over the previous such Table by 26 percent, including a 54 percent increase in interference in the highly congested northeast corridor.¹⁵ Furthermore,

given the congestion in these markets, stations have few (in many cases no) options to improve their service via channel or facility changes.¹⁶

In these circumstances, it simply makes no sense to limit the use of non-core spectrum channels for DTV in the most congested areas during the transition period, particularly given the goals of minimizing interference and replicating existing service. As MSTV rightly concludes, "intensification of the priority to keep channels 60-69 DTV-free has resulted in increased interference to the public's future and existing service."¹⁷ Individual stations and their existing viewers should not be asked to bear significant and

¹⁵Petition For Clarification and Partial Reconsideration of the Fifth and Sixth Reports and Orders Submitted by The Association of Maximum Service Television, Inc., The Broadcasters Caucus and Other Broadcasters, filed June 13, 1997, at 6-7.

¹⁶Id. at 8.

¹⁷Id. at 21.

disproportionate coverage area losses in order to provide spectrum to other users on a more expedited basis. Moreover, the failure to fully utilize the existing range of spectrum for transitional DTV assignments increases the likelihood of what ABC aptly has called a "Hobson's choice" over co- and adjacent channel stations: "either sacrifice NTSC viewers in one community or shortchange DTV viewers in the other."¹⁸ The assignments of DTV channels 8 and 61 in northern New Jersey have created exactly this dilemma.

III. The Commission Must Adopt A Floor On The Service Area Population Loss That May Be Imposed On Any Particular Station.

Mountain understands that any DTV allotment plan may result in some degree of interference to some stations, at least during the transition period. But the size of the service area population losses imposed on WMBC during the transition and threatened on a permanent basis clearly contravenes the Commission's underlying policy goals, to minimize interference to existing service and to replicate that service following the transition to DTV. Indeed, a number of broadcasters have sought reconsideration of service area losses far smaller than those faced by WMBC.¹⁹ These stations' losses are not insignificant. But the losses faced by WMBC are so extensive as to threaten its very survival and call into question the policy goals underlying the Sixth Order. Moreover, WMBC is a new, independent UHF

¹⁸ABC Petition at Attachment A, pp. 2-3.

¹⁹For example, National Broadcasting Company reports that WRC-TV, Washington will receive interference to 3.3 percent of its NTSC Grade B population and that WJAR, Providence will receive interference to 3.0 percent of its NTSC Grade B population. Petition For Clarification and Partial Reconsideration, filed June 13, 1997 by National Broadcasting Company, Inc., at 3-4. WNET indicates that its DTV assignment will ultimately reduce its service area population from 17,110,000 to 17,043,000, a loss of 0.33 percent. WNET Petition at 4.

station, lacking the resources and inherent advantages of other broadcast stations that filed petitions.

Mountain's original comments in this proceeding demonstrated the need for an absolute limit to the service area loss imposed on any one station and its viewers. The Sixth Report and Order, however, failed even to address that proposal. As a result, assignments have been adopted which threaten the existing service of numerous stations and the viability of at least one, WMBC. WMBC will lose nearly one in five of the residents in its NTSC viewing area during the transition to DTV, a loss of more than 1.5 million people, by the FCC's own calculations. Indeed, by the calculations of WMBC's consulting engineer, the population within the WMBC interference zone actually may be more than three million.²⁰ Mountain doubts that many stations could accept such a loss of viewership over the next decade (or longer), let alone a new, independent UHF station.

Moreover, the likelihood of delays in the transition to DTV makes the need for a floor on population loss even more acute. The Sixth Order contemplated the completion of the DTV transition by 2006, a long, long time for a station to endure the loss of one of every five people in its viewing area. It now appears, however, that the transition period is likely to be even longer. Under a bill proposed in the House of Representatives, broadcasters reportedly could be permitted to keep their analog spectrum until 95 percent of the households in their market are able to receive off-air digital broadcasts. A Senate bill reportedly would not require the return of analog channels until 95 percent of the households

²⁰Mountain Petition, Exhibit 1, at 2.

in a market had access to digital signals.²¹ Thus, Mountain may be forced to bear this 19 percent loss of service area population for more than a decade, if it can survive financially that long.

IV. The Sixth Order Imposes Unjustified Burdens On Small Businesses In The Provision Of Telecommunications Services.

The Commission's recent Report in General Docket No. 96-113 ("Small Business Report")²² is also highly relevant to this proceeding. The Telecommunications Act of 1996 required the Commission to identify and eliminate market entry barriers for small businesses in the provision and ownership of telecommunications and information services. 47 U.S.C. § 257(a).²³ The Small Business Report concluded that a key measure to implement Section 257 is to ensure meaningful comment on the impact of FCC proposals on small businesses in the rulemaking process.²⁴

In the DTV proceeding, the Commission has given television broadcasters the flexibility to provide supplemental digital services such as data transfer, subscription video, interactive materials, and other innovations.²⁵ The implementation of digital television thus

²¹Paige Albiniak, "No Spectrum Fees In Budget Bills," Broadcasting & Cable, June 30, 1997 at 14.

²²FCC 97-164, 62 Fed. Reg. 34647 (June 27, 1997).

²³In carrying out that proceeding, the Commission was required to promote the policies and purposes of the Act, favoring diversity of voices, vigorous economic competition, technological advancement and promotion of the public interest. 47 U.S.C. § 257(b).

²⁴Id. at ¶ 8.

²⁵Fifth Report and Order in MM Docket No. 87-268, FCC 97-116, released April 21, 1997.

provides an important opportunity for small businesses owning existing television stations to utilize their spectrum to provide new telecommunications and information services. To the extent that the transition to DTV accommodates small businesses generally, the freedom to provide new digital services will serve the Congressional goal of removing entry barriers to such businesses.

As Mountain stated in its comments, small businesses in television broadcasting are likely to be the licensees of independent UHF stations rather than VHF network affiliates.²⁶ Unfortunately, judging by the New York area assignments, the transition to DTV will constitute a significant burden on small businesses. The four stations that would experience the largest interference in the New York ADI during the transition are all UHF, and independent WMBC on channel 63 would bear the most significant loss of all. A small television broadcaster will not be able to expand into an auxiliary service business if its core television business is no longer economically viable. Moreover, reducing a station's service area will reduce the population to which it can provide auxiliary telecommunications or information services.²⁷ Thus, the present DTV assignments squander this opportunity to

²⁶The Commission declined to adopt a single "small business" definition based on a general size standard. Small Business Report at ¶ 25. In the DTV proceeding, however, the Commission has recognized that the Small Business Administration ("SBA") definition must apply for purposes of analysis under the Regulatory Flexibility Act ("RFA"). Sixth Order, Appendix D, at D-4. The RFA and SBA define the term "small business" as one which is independently owned and operated, not dominant in its field of operation, and has no more than a maximum of \$10.5 million in annual receipts. Id. at D-3. WMBC thus qualifies as a small business for purposes of the RFA.

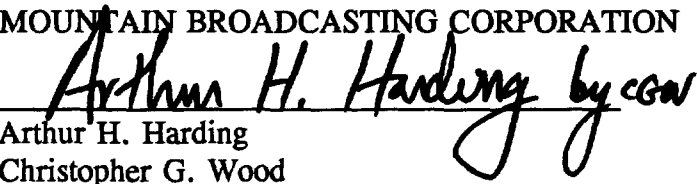
²⁷Similarly, the Association of Local Television Stations, Inc. has commented that UHF stations with low power levels will be disadvantaged in their delivery of ancillary services
(continued...)

promote the entry of small businesses into new services and thus to serve the goals of vigorous economic competition and diversity. Indeed, as Mountain's Petition already demonstrated, the Sixth Order failed to fully analyze the impact of DTV allotments on small businesses generally.²⁸ As the Small Business Report recognized, this analysis is a key means of serving the goals of Section 257.

The Commission must reconsider the harmful impact of the Sixth Order's channel assignments on WMBC.

Respectfully submitted,

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²⁷(...continued)

such as data transmission. Petition For Reconsideration, filed June 11, 1997, by the Association of Local Television Stations, at 7.

²⁸The Small Business Report did address the impact of the implementation of DTV on Section 257 in the context of low power TV stations, a secondary service. Small Business Report at ¶¶ 180-85.

CERTIFICATE OF SERVICE

I, Joan M. Trepal, a secretary at the law firm of Fleischman and Walsh, L.L.P.

hereby certify that copies of the foregoing Comments on Petitions for Reconsideration were served this 18th day of July 1997, by regular mail, upon the following:

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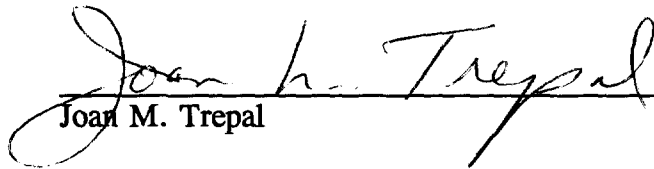
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